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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1939

No. [redacted] 23

WILSON AND CO., INC., A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. [redacted] 24

WILSON & CO., INC., OF KANSAS, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. [redacted] 25

T. M. SINCLAIR & COMPANY, LIMITED, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

J. HARRY COVINGTON,
DEAN G. ACHESON,
PAUL E. SHORB,
Counsel for Petitioners.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 778

WILSON AND CO., INC., A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. 779

WILSON & CO., INC., OF KANSAS, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

No. 780

T. M. SINCLAIR & COMPANY, LIMITED, A CORPORATION,
Petitioner,

vs.

THE UNITED STATES.

PETITION FOR WRITS OF CERTIORARI TO THE COURT OF CLAIMS.

Wilson and Co., Inc., Wilson & Co., Inc. of Kansas, and T. M. Sinclair & Company, Limited, petitioners herein, pray that writs of certiorari issue to review the decision of the

Court of Claims entered December 4, 1939, dismissing the petitions filed in that court in the instant cases for lack of jurisdiction.

Opinions Below.

The opinion of the Court of Claims covering all three cases is reported at 30 F. Supp. 672.

Jurisdiction.

The judgments and orders of the Court of Claims were entered on December 4, 1939. The jurisdiction of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Question Presented.

Whether the Court of Claims erred in holding that it lacked jurisdiction to entertain the instant suits for recovery of certain amounts claimed by petitioner as export drawbacks because of the provisions of Section 601(e) of the Revenue Act of 1936.

Statutes Involved.

The pertinent provisions of the Agricultural Adjustment Act and of the Revenue Act of 1936 are printed in the Appendix.

Statement.

This action was instituted by the filing of three petitions in the Court of Claims on March 31, 1939. The allegations of the petition in the Wilson and Co., Inc. case, which, *mutatis mutandis,* is identical with the petitions in the other cases, may be summarized as follows:

Petitioner is a corporation engaged in the preparation, packing and sale of meat products, including hog products, for foreign and domestic commerce. Between November 5, 1933 and January 6, 1936, petitioner exported, in its own

name, large quantities of hog products on which it had paid processing taxes and floor stock taxes pursuant to Sections 9(a) and 16(a) respectively of the Agricultural Adjustment Act, as amended (Act of May 12, 1933, c. 25, 48 Stat. 31, U. S. C., Title 7, Secs. 609, 616).

Upon the exportation of said hog products, and prior to June 22, 1936, the date the Revenue Act of 1936 was enacted, claims for refund were duly filed by petitioner with the Collector of Internal Revenue for the First District of Illinois, pursuant to and in compliance with the regulations prescribed by the Commissioner of Internal Revenue.[1] Each of these claims was rejected by the Commissioner in the amount shown in Exhibit A (See footnote 1, *supra*). Petitioner alleged that the taxes so paid are refundable to it pursuant to the provisions of Section 17(a) of the Agricultural Adjustment Act as amended (U. S. C., Title 7, Section 617).

On September 5, 1939 respondent moved to dismiss the petitions on the ground that the Court of Claims lacked jurisdiction to proceed with the cases with respect to amounts paid either as processing or floor stock taxes because petitioners did not allege or claim compliance with Section 902 or 903 of the Revenue Act of 1936, and also upon the ground that the court was without jurisdiction with respect to amounts paid as processing taxes because of Section 906 of that Act. In short, respondent asserted that petitioners could recover only under Title VII of the 1936 Act, which does not authorize suit in the Court of Claims. The Court of Claims, on December 4, 1939, overruled each of the grounds set forth in the motion to dismiss, but granted the motion nevertheless by reason of its conclusion, independently arrived at, that Section 601(e) of the Revenue

[1] The details of the claims are set out in Exhibit A to the petitions, which, by stipulation, are not printed in this Court. They are contained, however, in the certified record on file with the Clerk.

Act of 1936 deprived it of jurisdiction over the claims for both processing taxes and floor stock taxes.

Specification of Errors to be Urged.

The Court of Claims erred:

1. In holding that Section 601(e) of the Revenue Act of 1936 deprived it of jurisdiction to entertain these actions.

2. In not holding that petitioners were entitled to recover the amounts set out in their claims for refund.

3. In dismissing the petitions.

Reasons for Granting the Writs.

1. The decision of the court below, dismissing these petitions on the ground that it lacked jurisdiction to entertain them, is squarely in conflict with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Cudahy Bros. Co.* v. *LaBudde,* 92 F. (2d) 937, certiorari denied, 303 U. S. 659, and is also in conflict with the decision of the District Court for the Southern District of New York in *Neuss, Hesslein & Co., Inc.* v. *United States,* 30 F. Supp. 595. In the *Cudahy* case a claim of precisely the same character was entertained and recovery allowed, and in the *Neuss, Hesslein* case the Government's motion to dismiss for lack of jurisdiction was denied.

The opinions in the instant case and in the *Cudahy* case are consistent up to a certain point: each of them rejects the contention urged by the government that the remedy of processor-exporters seeking to recover export drawbacks on products subsequently exported is under Title VII of the Revenue Act of 1936. The Court of Claims, however, contrary to the Circuit Court of Appeals for the Seventh Circuit and the District Court for the Southern District of New York, held that nonetheless it was deprived of jurisdiction by virtue of the provisions of Section 601(e) of Title IV of the Revenue Act of 1936 which provides:

> "The determination of the Commissioner of Internal Revenue with respect to any refund under this section shall be final and no court shall have jurisdiction to review such determination."

This point was not argued and, indeed, was specifically disclaimed by the Government.

Were the position of the Court of Claims sound, obviously the District Courts and the Circuit Courts of Appeal are equally without jurisdiction in cases such as this. Indeed, the same argument was advanced by the Government in its unsuccessful petition for certiorari in the *Cudahy* case.[2] Beyond question, the two decisions are squarely in conflict.

2. The decision of the court below is based upon a wholly unwarranted application of Section 601(e). The instant suit, as indicated in the bill of complaint, is based upon Section 17(a) of the Agricultural Adjustment Act, as amended, *infra*, p. 8, which provided for a drawback of taxes paid upon exportation in order to encourage foreign trade and to relieve the country of undesirable domestic surpluses. Moreover, Congress had provided in Section 17(b) of the Agricultural Adjustment Act that processors might, instead of paying the tax, simply put up a bond guaranteeing export. See *Cudahy Bros. Co.* v. *LaBudde*, 92 F. (2d) at 938. By virtue of Section 17(a) petitioner became entitled to drawbacks in the amount of the taxes previously paid when it exported these products. *Campbell* v. *United States*, 107 U. S. 407.

The court below, however, has decided that, irrespective of petitioner's rights under Section 17(a), that section "became a part of" Section 601 of Title IV of the Revenue Act of 1936, *infra*, p. 8, because it was reenacted by subsection (a) of Section 601, and that consequently refunds must be governed by Section 601(e). That conclusion dis-

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[2] Petition for certiorari No. 823, October Term, 1937, p. 9.

regards the express mandate of Section 601(a), that the reenactment of Section 17(a) is for the purpose of allowing refunds "in accordance *therewith*" (not "herewith"), and also the obvious inapplicability of the other portions of Section 601 to a processor-exporter such as the present petitioner. See *Cudahy Bros. Co.* v. *LaBudde*, 92 F. (2d) at 939-940.

In effect the Court of Claims holds that although petitioners are clearly entitled to refunds merely by proving export of tax-paid commodities, they have no judicial recourse whatever if the Commissioner denies their claim. The Court of Claims agrees with the Seventh Circuit that Title VII is inapplicable and thus any judicial remedies therein provided are not available. It agrees that upon proof of export alone petitioners are entitled to a refund under Section 17(a) of the Agricultural Adjustment Act, as reenacted. But by a gratuitous and distorted interpretation of Section 601(e) of the Revenue Act of 1936, it concludes that neither it nor any other court has jurisdiction to require payment.

3. The conflict of decisions between the *Cudahy* case and the instant one should be resolved by this Court. Unless it is resolved, claimants such as petitioners will recover if they institute an action in the District Courts, as in the *Cudahy* and *Neuss, Hesslein* cases, but will not recover if they institute an action in the Court of Claims. That result is plainly contrary to the intention of Congress. Moreover, petitioners are advised by the Bureau of Internal Revenue that there are not less than four thousand claims of this character which may still be the subject of litigation and that the amount involved in those claims is roughly $2,000,000. Obviously, therefore, the matter is of substantial importance in the proper administration of the revenue laws.

Conclusion.

WHEREFORE, it is respectfully submitted that this petition for certiorari should be granted.

J. HARRY COVINGTON,
DEAN G. ACHESON,
PAUL E. SHORB,
Counsel for Petitioners.

March, 1940.

APPENDIX.

Section 17 of the Agricultural Adjustment Act of May 12, 1933, as amended (Chapter 25, 48 Stat. 31), provides as follows:

> (a) Upon the exportation to any foreign country (and/or to the Philippine Islands, the Virgin Islands, American Samoa, the Canal Zone, and the island of Guam) of any product processed wholly or partly from a commodity with respect to which product or commodity a tax has been paid or is payable under this title, the tax due and payable or due and paid shall be credited or refunded. Under regulations prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, the credit or refund shall be allowed to the consignor named in the bill of lading under which the product is exported or to the shipper or to the person liable for the tax provided the consignor waives any claim thereto in favor of such shipper or person liable for the tax. * * *

The Revenue Act of 1936 (Chapter 690, 49 Stat. 1648) provides as follows:

> TITLE IV—EXPORT, CHARITABLE, ETC., REFUNDS AND FLOOR-STOCKS ADJUSTMENT UNDER AGRICULTURAL ADJUSTMENT ACT.
>
> SEC. 601. REFUNDS UNDER AGRICULTURAL ADJUSTMENT ACT ON EXPORTS, DELIVERIES FOR CHARITABLE DISTRIBUTION OR USE, ETC.
>
> (a) The provisions of sections 10 (d), 15 (a), 15 (c), 16 (e) (1), 16 (e) (3), and 17 (a) of the Agricultural Adjustment Act, as amended, are hereby reenacted but only for the purpose of allowing refunds in accordance therewith in cases where the delivery for charitable distribution or use, or the exportation, or the manufacture of large cotton bags, or the decrease in the rate of the processing tax or its equivalent under section 16 (e) (3), took place prior to January 6, 1936.

(b) Except for refunds under section 15 (a) of the Agricultural Adjustment Act, as reenacted herein, no refund under this section shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based. No refund under this section shall be allowable to any person with respect to any articles where such person prior to January 6, 1936, paid an amount as tax under the Agricultural Adjustment Act, as amended, by taking as a credit against such amount an amount otherwise allowable as a refund with respect to such articles under sections 15 (a), 15 (c), 16 (e) (1), 16 (c) (3), or 17 (a) of said Act. No refund under this section shall be allowed to any person except to the extent that he establishes that he has not received, and is not entitled to receive, reimbursement of such amount from the processor or other vendor with respect to the articles on which the claim is based. No claim under this section (except claims of processors under section 15 (a)) shall be disallowed on the ground that the tax with respect to the article or the commodity from which processed has not been paid.

(c) No refund under this section shall be made unless the claimant files a claim therefor prior to January 1, 1937, under rules and regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, and no claim shall be allowed in an amount less than $10. Sections 16 (g) and 21 (f) of the Agricultural Adjustment Act, as amended, are repealed.

(d) In the absence of fraud, the findings of fact and the decision of the Commissioner of Internal Revenue upon the merits of any claim adjusted pursuant to this section and the mathematical calculation therein shall not be subject to review by any administrative or accounting officer, employees, or agent of the United States.

(e) The determination of the Commissioner of Internal Revenue with respect to any refund under this

section shall be final and no court shall have jurisdiction to review such determination.

(f) No interest shall be allowed in connection with any refund made under this section.

(g) Section 16 (e) (1) of the Agricultural Adjustment Act, as reenacted by subsection (a) of this section, is amended by striking out "subsequent to June 26, 1934" and by inserting in lieu thereof "on or after June 1, 1934."

SEC. 602. FLOOR STOCKS AS OF JANUARY 6, 1936.

(a) There shall be paid to any person who, at the first moment of January 6, 1936, held for sale or other disposition (including manufacturing or further processing) any article processed wholly or in chief value from a commodity subject to processing tax, an amount computed as provided in subsection (b), except that no such payment shall be made to the processor or other person who paid or was liable for the tax with respect to the articles on which the claim is based.

(b) The amount of the payment under subsection (a) shall be equal to the processing tax which would have been payable with respect to the commodity from which the article was processed, if it had been processed on January 5, 1936, but not in excess of (1) the amount of the burden of the tax with respect to the article which was shifted to the claimant in the price he paid for the article * * *.

* * * * * * *

TITLE VII—REFUNDS OF AMOUNTS COLLECTED UNDER THE AGRICULTURAL ADJUSTMENT ACT.

SEC. 901. REPEALS.—Sections 21 (d), 21 (e), and 21 (g) of the Agricultural Adjustment Act, as amended, are hereby repealed.

SEC. 902. CONDITIONS ON ALLOWANCE OF REFUNDS.—No refund shall be made or allowed, in pursuance of court decisions or otherwise, of any amount paid by or

collected from any claimant as tax under the Agricultural Adjustment Act, unless the claimant establishes to the satisfaction of the Commissioner in accordance with regulations prescribed by him, with the approval of the Secretary, or to the satisfaction of the trial court, or the Board of Review in cases provided for under section 906, as the case may be—

(a) That he bore the burden of such amount and has not been relieved thereof nor reimbursed therefor nor shifted such burden, directly or indirectly, (1) through inclusion of such amount by the claimant, or by any person directly or indirectly under his control, or having control over him, or subject to the same common control, in the price of any article with respect to which a tax was imposed under the provisions of such Act, or in the price of any article processed from any commodity with respect to which a tax was imposed under such Act, or in any charge or fee for services or processing; (2) through reduction of the price paid for any such commodity; or (3) in any manner whatsoever; and that no understanding or agreement, written or oral, exists whereby he may be relieved of the burden of such amount, be reimbursed therefor, or may shift the burden thereof; or

(b) That he has repaid unconditionally such amount to his vendee (1) who bore the burden thereof, (2) who has not been relieved thereof nor reimbursed therefor, nor shifted such burden, directly or indirectly, and (3) who is not entitled to receive any reimbursement therefor from any other source, or to be relieved of such burden in any manner whatsoever.

SEC. 903. FILING OF CLAIMS.—No refund shall be made or allowed of any amount paid by or collected from any person as tax under the Agricultural Adjustment Act unless, after the enactment of this Act, and prior to July 1, 1937, a claim for refund has been filed by such person in accordance with regulations prescribed by the Commissioner with the approval of the Secretary. All evidence relied upon in support of such

claim shall be clearly set forth under oath. The Commissioner is authorized to prescribe by regulations, with the approval of the Secretary, the number of claims which may be filed by any person with respect to the total amount paid by or collected from such person as tax under the Agricultural Adjustment Act, and such regulations may require the claims for refund of processing taxes with respect to any commodity or group of commodities shall cover the entire period during which such person paid such processing taxes.

SEC. 904. STATUTE OF LIMITATIONS.—Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of enactment of this Act, shall be brought or maintained in any court for the recovery, recoupment, set-off, refund, or credit of, or counterclaim for, any amount paid by or collected from any person as tax (except processing tax, as defined herein) under the Agricultural Adjustment Act (a) before the expiration of eighteen months from the date of filing a claim therefor under this title, unless the Commissioner renders a decision thereon within that time, or (b) after the expiration of two years from the date of mailing by registered mail by the Commissioner to the claimant a notice of disallowance of that part of the claim to which such suit or proceeding relates. Any consideration or any action by the Commissioner with respect to such claim following the mailing of notice of disallowance shall not operate to extend the period within which any suit or proceeding may be brought.

SEC. 905. JURISDICTION OF COURTS.—Concurrent with the Court of Claims, the District Courts of the United States (except as provided in section 906 of this title) shall have jurisdiction of cases to which this title applies, regardless of the amount in controversy, if such district courts would have had jurisdiction of such cases but for limitations under the Judicial Code, as amended, on jurisdiction of such courts based upon the amount in controversy. The United States Customs Court shall not have jurisdiction of any such cases.

SEC. 906. PROCEDURE ON CLAIMS FOR REFUNDS OF PROCESSING TAXES.

(a) Notwithstanding any other provision of law, no suit or proceeding, whether brought before or after the date of the enactment of this Act, shall be brought or maintained in any court for the refund of any amount paid or collected as processing tax, as defined herein, under the Agricultural Adjustment Act, except as provided in this section. * * *

(b) There is hereby established in the Treasury Department a Board of Review (hereinafter referred to as "the Board"). The Board shall be composed of nine members who shall be officers or employees of the Treasury Department designated by the Secretary of the Treasury. * * * The Board shall have jurisdiction in proceedings under this section to review the allowance or disallowance of the Commissioner of a claim for refund, and to determine the amount of refund due any claimant with respect to such claim. The Commissioner shall make refund of any such amount determined by a decision of the Board which has become final. * * *

* * * * * * *

(g) A review of the decision of the Board, made after the hearing provided in this section, may be obtained by the claimant or Commissioner by filing a petition for review in the Circuit Court of Appeals of the United States within any circuit wherein such claimant resides, or has its principal place of business, or, if none, in the United States Court of Appeals for the District of Columbia, or any such court which may be designated by the Commissioner and the claimant by stipulation in writing within three months after the date of the mailing to the claimant and the Commissioner of the copy of the findings and decision of the Board. * * * The judgment of the court shall be final, subject to review by the Supreme Court of the United States, upon certification or certiorari as pro-

vided in Sections 239 and 240 of the Judicial Code, as amended.

* * * * * * *

SEC. 911. INAPPLICABILITY TO CERTAIN REFUNDS.

The provisions of this title shall not apply to any refund authorized under the provisions of sections 15, 16, or 17 of the Agricultural Adjustment Act, as amended and reenacted, or with respect to any articles exported under the provisions of section 317 of the Tariff Act of 1930. No refund shall be made or allowed of any amount paid or collected as tax under the Agricultural Adjustment Act, as amended and reenacted, to the extent that refund or credit with respect to such amount has been made to any person.

* * * * * * *

SEC. 913. DEFINITIONS.

When used in this title—

(a) The term "tax" means a tax or exaction denominated a "tax" under the Agricultural Adjustment Act, and shall include any penalty, addition to tax, additional tax, or interested applicable to such tax.

(b) The term "processing tax" means any tax or exaction denominated a "processing tax" under the Agricultural Adjustment Act, but shall not include any amount paid or collected as tax with respect to the processing of a commodity for a customer for a charge or fee.